No. 83-218

In the Supreme Court of the United States

OCTOBER TERM, 1983

AMOS REED, ETC. AND THE ATTORNEY GENERAL OF NORTH CAROLINA, PETITIONERS

v.

DANIEL ROSS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether respondent, a federal habeas petitioner, should be excused from his procedural default in state court on the ground that the constitutional claim he now wishes to assert—based on *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975)—was "novel" at the time his conviction became final in 1969.

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INTEREST OF THE UNITED STATES

This case raises an important question concerning the availability of federal habeas corpus relief when a defendant has failed to comply with legitimate procedural rules requiring that claims be timely raised or forfeited. The Federal Rules of Criminal Procedure expressly provide that certain types of claims must be raised before or at trial. See Fed. R. Crim. P. 12, 30; see also Fed. R. Evid. 103(a)(1). More generally, a criminal defendant's failure to make timely objection at trial is frequently held to bar the claim, although on direct appeal an appellate court may sometimes notice plain error affecting substantial rights. Fed. R. Crim. P. 52(b). See, *e.g.*, *United States* v. *Indiviglio*, 352 F.2d 276, 279-281 (2d Cir. 1965) (en banc), cert. denied, 383 U.S. 907 (1966). Failure to take an appeal or preserve a particular claim on appeal can also bar subsequent litigation of the claim. *Sunal* v. *Large*, 332 U.S. 174 (1947); *Norris* v. *United States*, 687 F.2d 899 (7th Cir. 1982).

The standard for determining when an error that was not duly objected to at trial or raised on direct appeal can nevertheless support collateral relief is of substantial importance to the administration of justice in the federal system. The holding of the court of appeals in this case—that the constitutional infirmity of a jury instruction was a "novel" conception six years before this Court decided the issue, and that such novelty was sufficient cause to excuse a failure to make timely objection—if sustained by this Court, would substantially increase the susceptibility of otherwise final judgments in federal criminal cases to collateral attack.

STATEMENT

1. Respondent shot and killed his wife on November 1, 1968. The evidence at trial showed that respondent was then separated from his wife and living in New York; his wife was living at her mother's home in Raleigh, North Carolina. On November 2, respondent appeared with his sister at the home in Raleigh. They took respondent's wife and two children to a shopping center, and on their return respondent and his wife entered the house. His wife's brother, Leon Young, testified that he was outside at the time, and heard two shots. Young ran to the house and saw respondent come out, reload his gun, and shoot his wife again. According to Young, respondent's wife " 'did not have a weapon of any kind * * *.' " *State* v. *Ross*, 275 N.C. 550, 551, 169 S.E.2d 875, 876 (1969). Young testified that respondent then " 'ran to his sister's car, said something about the hospital, and they drove away. I did not see any injuries on [respondent]' " (*ibid.*). Young's testimony was corroborated by Charles McAllister, who was in the house at the time (*ibid.*).

Respondent himself testified that after returning from the shopping center he and his wife "had a conversation about a girl that I used to mess around with" (J.A. 18). As he was leaving the room, respondent continued, his wife stabbed him in the back of the neck with "a knife,

fork, or something" that Young had handed to her (*ibid.*). He then turned around and shot her twice. As he was leaving he fired another shot at Young who, he testified, was approaching him "with some object in his hand" (*ibid.*). Respondent's sister corroborated his statement "that he had a profusely bleeding wound on his neck" (169 S.E.2d at 877).

The trial court instructed the jury that respondent had the burden of proving self-defense (which would have exonerated him entirely) and lack of malice (which would have affected the degree of the offense) (Pet. App. 2; J.A. 23-24). The jury returned a verdict of guilty of murder in the first degree, and recommended life imprisonment. The North Carolina Supreme Court affirmed the conviction on October 15, 1969. *State* v. *Ross*, *supra*.

2. Respondent did not object either at trial or on appeal to the court's instruction on the burden of proof. Subsequently, in *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975), this Court held that in a murder case the prosecution must prove beyond a reasonable doubt that the defendant did not act on sudden provocation or in the heat of passion. In *Hankerson* v. *North Carolina*, 432 U.S. 233 (1977), on direct review of a conviction, the Court held that *Mullaney* applied retroactively to a trial that took place in 1974. Respondent then unsuccessfully sought post-conviction relief in state court, relying on *Mullaney* and *Hankerson* (Pet. Br. App. A3-A8).

Thereafter, respondent began this proceeding under 28 U.S.C. 2254. The district court held that it was barred from considering the petition because the State itself would not permit post-conviction consideration of claims not raised either at trial or on appeal (Pet. App. 3). The court of appeals dismissed respondent's appeal. *Ross* v. *Reed*, 660 F.2d 492 (4th Cir. 1981). This Court vacated the judgment, however, and remanded for further consideration in light of *Engle* v. *Isaac*, 456 U.S. 107 (1982), and *United States* v. *Frady*, 456 U.S. 152 (1982). *Ross* v. *Reed*, 456 U.S. 921 (1982).

On remand the court of appeals reversed and directed that a writ of habeas corpus issue unless respondent was retried within a reasonable time (Pet. App. 9). The court found that respondent's failure to object to the burden of proof instruction either at trial or on direct appeal was excused under the "cause and prejudice" rule applied in *Isaac* and *Frady*. The State itself conceded that the prejudice requirement was satisfied, since both respondent and his sister gave testimony suggesting that respondent had reacted to an attack on him by his wife. Under those circumstances, imposing the burden of persuasion on respondent could have influenced the jury's verdict (Pet. App. 5).

The court also held that respondent had shown cause for his failure to object, because the claim that he now asserts was too novel in 1969 for him to have anticipated. *Mullaney* was not decided until 1975; and even *In re Winship*, 397 U.S. 358 (1970) (prosecution must prove every element of the offense beyond a reasonable doubt), was not decided until five months after respondent's conviction had been affirmed by the state supreme court (Pet. App. 2, 6). In 1969, the court stated, those decisions were only "foreshadowed by straws in the wind" (*id.* at 7). To require objection on direct appeal under those circumstances,[1] it concluded, would oblige counsel "to raise and argue every conceivable constitutional claim, no matter how far fetched, in order to preserve a right for post conviction relief upon some future, unforeseen development in the law" (*id.* at 7-8).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents the question whether a Section 2254 petitioner who has failed to raise a constitutional claim at trial or on direct appeal, and who therefore is barred from presenting the claim in state court, has shown cause

[1] According to the State's petition, contemporaneous objection was not required at trial, but was on direct appeal, in order to preserve review of jury instructions (Pet. 3).

for his procedural default (see *Wainwright* v. *Sykes*, 433 U.S. 72, 87 (1977)) on the basis that the claim was novel at the time of his trial and direct appeal (see *Engle* v. *Isaac*, 456 U.S. at 131). As a preliminary matter, we note several aspects of the case that we do not address.

First, although the orders dismissing respondent's state petition for post-conviction review (Pet. Br. App. A3-A4) and subsequent petition for a writ of certiorari (*id.* at A8) do not reveal the basis for denial, we assume for the reasons given by petitioner (Pet. Br. 10-12) that the State enforced its procedural default rule in this case.

Second, we doubt that there is merit to respondent's suggestion (Br. in Opp. 3) that the state supreme court abandoned its right to rely on the state default rule by examining the charge to the jury for plain error on its own initiative. See *State* v. *Ross*, 275 N.C. at 554, 169 S.E.2d at 878. The fact that an appellate court is willing to engage in the commendable practice of examining a record for plain error should not carry with it the penalty of opening the case up to collateral attack on any issue the court may have overlooked. See also *McLaughlin* v. *Gabriel*, No. 83-1413 (1st Cir. Jan. 27, 1984), slip op. 4-6.

I

A. Respondent's claim that the state has the burden of persuasion on the issues of malice and self-defense was not novel in 1969. The great majority of state courts addressing those issues by 1969 had already imposed that burden on the prosecution. Though their decisions were not explicity based on the Due Process Clause, their views and reasons "reflect a profound judgment about the way in which law should be enforced and justice administered." *In re Winship*, 397 U.S. at 361-362 (quoting *Duncan* v. *Louisiana*, 391 U.S. 145, 155 (1968)). Federal cases during the same period, following the burden of proof rule announced in *Davis* v. *United States*, 160 U.S. 469 (1895), regarded the government's burden of proof beyond a reasonable doubt as so fundamental that it was a tenet of due process. Considered collectively, these cases

provided "the tools to construct the[] constitutional claim." *Engle* v. *Isaac*, 456 U.S. at 133.

B. Given the weight of authority on the allocation of the burden of proof by 1969, it is entirely proper that respondent should be bound by his procedural default. *Engle* holds that a habeas petitioner does not establish cause simply by showing that the state court would in all probability have rejected the claim. 456 U.S. at 130. It also holds that the inadvertence or neglect of counsel—at least in cases falling short of constitutionally ineffective assistance—cannot excuse a procedural default.

These principles are applicable to a default on direct appeal (the situation here) just as they are to defaults at trial. A rule requiring that issues be raised on direct appeal furthers the state's interest in avoiding piecemeal review of convictions. More important, such a rule makes it possible to correct trial court errors promptly enough to permit effective retrial. Filing a Section 2254 action after neglecting to present an important issue on direct appeal also deprives the federal court of the benefit of the state court's views on the record and issues of state law.

II

A. It is no accident that the issue decided in *Mullaney* and made fully retroactive in *Hankerson* should not have been novel at the time of respondent's trial and appeal. In fact, the principles governing retroactivity in themselves assure that procedural rights made fully retroactive will not have been novel when cases now on collateral review were tried. Such rights, essential as they must be to the truth-finding process at trial, are read into the Constitution precisely because they are "implicit in the concept of ordered liberty," and can therefore "be traced in our history, political and legal." *Palko* v. *Connecticut*, 302 U.S. 319, 325, 327 (1937). Retroactive application thus has "the justifiable effect of curing errors committed in disregard of constitutional rulings already clearly foreshadowed." *Johnson* v. *New Jersey*, 384 U.S. 719, 731 (1966).

B. The unlikelihood that novelty can be demonstrated for any rights made fully retroactive suggests that an inquiry into that issue will be unproductive. Moreover, the mass of materials relevant to a decision, and the lack of any definite standard for deciding exactly when a claim can last have been considered novel, provide further reasons for avoiding such a burdensome and speculative inquiry unless justice demands it.

If one were to conclude that a habeas petitioner's claim was novel at the time of his conviction, then it is difficult to see how its violation could have rendered his trial "fundamentally unfair." *Engle* v. *Isaac*, 456 U.S. at 131. After all, the very idea of novelty implies that the entire legal system at the time viewed the procedures used to convict as constitutionally proper. The rule adopted by the court of appeals has the ironic effect of overturning convictions obtained in compliance with contemporary standards at the time of trial, while leaving intact those (later obtained) which violate the standards applicable to the later trials. This rather perverse willingness to undo more ancient, rather than more recent, convictions is precisely the opposite of the approach our legal system takes toward newly discovered evidence. Fed. R. Crim. P. 33.

ARGUMENT

The issue in this case is similar to that decided in *Engle* v. *Isaac*, 456 U.S. 107 (1982). There the respondents, two of whom had been convicted before this Court's decision in *Mullaney* v. *Wilbur*, argued that they had shown cause for their failure to object to jury instructions imposing on them the burden of proving self-defense, because the constitutional objection validated in *Mullaney* was "unknown at the time of trial." 456 U.S. at 131. This Court stated (456 U.S. at 131) (footnotes omitted):

> We need not decide whether the novelty of a constitutional claim ever establishes cause for a failure to object. We might hesitate to adopt a rule that would require trial counsel either to exercise extraor-

> dinary vision or to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim. On the other hand, later discovery of a constitutional defect unknown at the time of trial does not invariably render the original trial fundamentally unfair. These concerns, however, need not detain us here since respondents' claims were far from unknown at the time of their trials.
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> * * * * *
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> Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default.

The respondents in *Isaac* were tried in 1975, and this Court held (456 U.S. at 131) that by that date *In re Winship*, 397 U.S. 358 (1970), provided a "basis for their constitutional claim." Respondent here was convicted, and his conviction was affirmed by the state supreme court, in 1969. The issues are thus: (i) whether an issue that was not novel in 1975 was so in 1969; and if it was, (ii) whether novelty establishes cause for respondent's failure to object to the jury instructions on self-defense and malice.

We view these issues of novelty and procedural default, as we must, against the background of evolving substantive law and principles of retroactivity. For it is inevitable that this Court's willingness to accept changes in constitutional doctrine concerning the rights of criminal defendants, and its willingness to make new doctrine retroactive, must both be affected by the perceived systemic costs of such new doctrine, particularly decisions about how much respect to accord legitimate procedural default rules. A decision such as *Mullaney* announcing a constitutional rule about the allocation of the burden of proof has important consequences for future criminal trials. Making such a rule fully retroactive when the claim has been duly considered but erroneously rejected by

the lower courts, as *Hankerson* states should be done, widens somewhat the circle of cases affected. But the consequences of enlarging that circle further to encompass past cases in which the issue was not even preserved are likely to be a great deal more serious than this Court envisioned in *Hankerson*. The Court there noted, addressing this very issue (432 U.S. at 244 n.8):

> [W]e are not persuaded that the impact on the administration of justice in those States that utilize the sort of burden-shifting presumptions involved in this case will be as devastating as [North Carolina] asserts. If the validity of such burden-shifting presumptions were as well settled in the States that have them as [North Carolina] asserts, then it is unlikely that prior to *Mullaney* many defense lawyers made appropriate objections to jury instructions incorporating those presumptions. Petitioner made none here. The North Carolina Supreme Court passed on the validity of the instructions anyway. The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error. See, *e.g.*, Fed. Rule Crim. Proc. 30.

If the Court should conclude in this case that such "normal and valid rule[s]" insulate only the most recent convictions, it will have expanded greatly the impact that fully retroactive decisions have on the administration of criminal justice.

I. RESPONDENT'S CONSTITUTIONAL CLAIM WAS NOT NOVEL IN 1969

A. Respondent's Claim That The State Had The Burden Of Proof, Though Not Yet Validated By This Court, Was Frequently Litigated And Widely Accepted In 1969

The court of appeals excused respondent's procedural default because it concluded that in 1969 a claim that the prosecution had the burden of proving malice and disproving self-defense was "novel," foreshadowed only by a

"hint here and there voiced in other contexts" (Pet. App. 7). In fact, however, such claims were frequently litigated in both state and federal courts, and by the time of respondent's trial the majority of courts reaching the issue had held instructions imposing the burden of persuasion on the defendant to be improper.

This Court recognized as much in *Mullaney* (421 U.S. at 693-696), noting that the clear trend in the states since early in this century had been away from the rule of *Commonwealth* v. *York*, 50 Mass. 93 (1845), which imposed on a defendant the burden of persuasion to negate malice aforethought. Our research reveals that as of 1969, at least 19 states imposed the burden of persuasion on the prosecution to establish malice;[2] only eight agreed with North Carolina's requirement that a defendant shoulder the persuasion burden.[3] The same is true with respect the burden of persuasion on self-defense.[4] At the time of respondent's trial no fewer than 23 states agreed that the burden of persuasion rested on the state, and that a defendant had at most the burden of producing some evidence on that defense.[5] Five more required the defendant simply to raise a reasonable doubt on that issue—a requirement that differs in little more than form from the majority rule.[6] Only 12 states (including North Carolina) placed the persuasion burden on a defendant.[7]

To be sure, these state cases do not hold that allocation of the persuasion burden to the prosecution is required by the Due Process Clause of the Fourteenth

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[2] See App. *infra*, 1a-2a.

[3] See App. *infra*, 3a.

[4] Though this Court has not held that the Constitution requires the prosecution to negate a claim of self-defense, *Mullaney* also recognized that the "majority rule" in the states imposed the burden of persuasion on the prosecution (421 U.S. at 702 n.30).

[5] See App. *infra*, 4a-6a.

[6] See App. *infra*, 7a.

[7] See App. *infra*, 8a-9a.

Amendment. But individually and collectively they go far toward establishing that conclusion. Considered singly, many of them indicate that imposing the burden of proving malice and disproving self-defense on the prosecution is demanded by considerations of fairness fundamental to our system of justice[8]—the very standard *Mullaney* applied in deciding the constitutional issue. See 421 U.S. at 701 ("the traditional burden which our system of criminal justice deems essential"). Taken together, the weight of opinion expressed in these cases "'reflect[s] a profound judgment about the way in which law should be enforced and justice administered.'" *In re Winship*, 397 U.S. at 361-362, quoting *Duncan* v. *Louisiana*, 391 U.S. at 155.[9]

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[8] See, *e.g.*, *State* v. *Wilcox*, 48 S.D. 289, 204 N.W. 369, 372 (1925), where, in overruling the former state practice requiring a defendant to prove self-defense by a preponderance of the evidence, the court observed that allocating only a production burden to a defendant and requiring the prosecution to retain the burden of persuasion "seems to us to be a more humane and reasonable rule." And in *Wright* v. *People*, 4 Neb. 407, 409 (1876), the court said, in adopting a rule requiring the prosecution to prove a defendant's sanity: "[W]e feel at liberty to adopt that rule which to our mind seems, not only to be founded in reason, but, to conform to those humane principles which underlie our system of criminal laws." The rule in *Wright* was later relied on to allocate the burden of persuasion concerning a claim of self-defense to the prosecution. *Gravely* v. *State*, 38 Neb. 871, 57 N.W. 751, 752 (1894). And an opinion that was frequently cited in the late 19th and early 20th centuries stated that "[i]t is a cardinal rule in criminal prosecutions that the burden of proof rests upon the prosecutor." *Stokes* v. *People*, 53 N.Y. 164, 181 (1873) (Rapallo, J., concurring). In fact, the author viewed that rule to be so fundamental that he believed an instruction shifting the burden of proof to a defendant could never be harmless, because it was "so vital" (*id.* at 183).

[9] This is not to suggest that the potential connection between these cases and the demands of the Constitution was not perceived. For example, the initial draft of the ALI's Model Penal Code dealing with the burden of proof required the prosecution to prove "each element of [an] offense * * * beyond a reasonable doubt," save for certain exceptional defenses "plainly require[d]" by

The treatment of these issues in the federal courts lends still more support to the conclusion that the point was far from novel by the date of respondent's trial and appeal. Several federal courts, following the rule announced in *Davis* v. *United States*, 160 U.S. 469 (1895), regarded the requirement that the government prove all elements of an offense beyond a reasonable doubt as so fundamental that it was a tenet of due process.[10] And as this Court has already recognized (*Engle* v. *Isaac*, 456 U.S. at 131-132 n.39), even before *Winship* the Eighth Circuit had held that the Iowa practice of requiring a defendant to prove the defense of alibi violated due process. *Stump* v. *Bennett*, 398 F.2d 111 (en banc), cert. denied, 393 U.S. 1001 (1968). The court in *Stump* correctly observed: "That an oppressive shifting of the burden of proof to a criminal defendant violates due process is not a new doctrine within constitutional law" (398 F.2d at 122). See also *McLaughlin* v. *Gabriel*, *supra*, slip op. 6-7.

B. Since Respondent's Claims Were Not Novel, He Is Bound By His Procedural Default

Given the voluminous litigation prior to 1969 concerning the placement of the burden of proof, novelty affords no just cause to excuse respondent from his failure to

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statute. Model Penal Code § 1.13(1) and (2)(b) (Tent. Draft No. 4, 1955). And the comments on that section state that "to impose a burden of persuasion on defendants as to matters involved in their guilt or innocence of an offense ought to be viewed as raising a more serious issue of constitutionality than the mere imposition of a burden of adducing evidence." *Id.* at page 113. Though the draft went on to say that "due process poses no impenetrable barrier to shifting the burden of persuasion" if done under "conservative" limitations (*ibid.*), it suffices for purposes of the question here that the issue was recognized many years before respondent's trial, not that the result in *Mullaney* was accepted.

[10] See Appendix *infra*, 10a. Indeed, *Winship* itself expressed the view that *Davis*'s burden of proof rule had constitutional roots. 397 U.S. at 362-363. But see *Leland* v. *Oregon*, 343 U.S. 790, 797 (1952).

raise the issue at trial or on direct appeal. We note, as an initial matter, the irrelevance of the fact that respondent's attorney (rather than he himself) may have borne the responsibility for recognizing and raising the point. For "the decision to assert or not to assert constitutional rights or constitutionally based objections at trial is necessarily entrusted to the defendant's attorney, who must make on-the-spot decisions at virtually all stages of a criminal trial." *Wainwright* v. *Sykes*, 433 U.S. at 93 (Burger, C.J., concurring). See also *id.* at 95 n.2 (Stevens, J., concurring).[11]

Neither can the decision about "cause" for respondent's procedural default turn on the reasons (or lack of them) behind his counsel's failure to raise the issue. It can no longer be argued, after this Court's decision in *Engle* v. *Isaac*, that the default is excused simply because the state supreme court in all likelihood would have rejected the claim—as, indeed, it rejected a few years later the claim of the defendant in *Hankerson*. "[T]he futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial. If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim." 456 U.S. at 130 (footnote omitted). The decision not to argue an issue under those circumstances is no different from litigation judgments that counsel must make in every case. If a lawyer has several points to make at trial or on appeal, any one of which might be dispositive, he will often refrain from making others that are less promising on the theory that

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[11] See also *Estelle* v. *Williams*, 425 U.S. 501, 508 n.3 (1976); *id.* at 513-515 (Powell, J., concurring); *United States ex rel. Cruz* v. *LaVallee*, 448 F.2d 671, 679 (2d Cir. 1971), cert. denied, 406 U.S. 958 (1972). See generally *Sanders* v. *United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 149-150 (1970).

raising a borderline claim may divert attention from or dilute the force of other arguments he deems more likely to succeed. See *Jones* v. *Barnes*, No. 81-1794 (July 5, 1983), slip op. 6-9.[12]

Indeed, even if one assumes that counsel's inaction resulted from inadvertence or negligence, there is not sufficient cause to excuse a procedural default—at least in situations falling short of constitutionally ineffective assistance of counsel. The possibility that an attorney may make an error of judgment or overlook a potentially meritorious claim is inherent in an adversary system, and ordinarily even "erroneous" decisions by counsel must be deemed binding. See *Estelle* v. *Williams*, 425 U.S. 501, 508 n.3, 512 (1976); *id.* at 514-515 & nn.3, 4 (Powell, J., concurring). Addressing this very contention in *Engle* v. *Isaac*, 456 U.S. at 134, the Court observed:

> We have long recognized * * * that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim. Where the basis of a constitutional claim is available, and other defense counsel have perceived and litigated that claim, the demands of comity and finality counsel against labeling alleged unawareness of the objection as cause for a procedural default.

These principles are not only inherent in an adversary system, but warranted by "the demands of comity and finality" recognized in *Engle* v. *Isaac*. Enforcement of a contemporaneous objection rule, for example, promotes a system in which both the prosecution and the trial court have an opportunity to consider the wisdom of pursuing a particular position. If a defendant objects to the court's jury instruction (either during a charge con-

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[12] For these reasons, we do not share the court of appeals' concern (Pet. App. 7) about the incremental effect of enforcing a procedural default in cases like this on the defense counsel's choice of issues to preserve at trial and on appeal.

ference or immediately after the jury is instructed), the court is afforded a chance to determine whether to give (or if necessary to correct) a potentially erroneous charge. If the defendant objects to the admission of evidence he may succeed in getting it excluded, or the prosecutor may reconsider his proffer rather than risk reversal by either a state appellate court or a federal habeas court. If a questionable statement is made during summation, a contemporaneous objection gives the trial court an opportunity to cure any possible error by appropriately cautioning the jury.

If a defendant prevails on his objections, he may succeed as well in securing an acquittal from the jury. If he prevails and is convicted, the timely objection will at least have reduced the number of points to be reviewed on appeal. And even if the objection is denied, it will often serve the purpose of enabling the trial judge to make a record on a claim when the recollection of the witnesses and parties is freshest. A reviewing court will thus have a better opportunity to weigh the merits of a claim of error. See *Wainwright* v. *Sykes*, 433 U.S. at 88-89; *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977). "Any procedural rule which encourages the result that [trial] proceedings be as free of error as possible is thoroughly desirable, and the contemporaneous-objection rule surely falls within this classification." *Wainwright* v. *Sykes*, 443 U.S. at 90.

Nor do we think that there is any reason for giving such respect to state contemporaneous objection rules but ignoring this State's "equivalent interests in discouraging procedural defaults during appellate proceedings" (Pet. App. 4). See note 1, *supra*. In the latter case the state has an obvious interest in avoiding piecemeal review of convictions—first on direct appeal, then later in a state-court collateral attack. More important, a rule that objections must at least be raised on direct review makes it possible to correct trial court errors promptly enough to permit effective retrial. Here, for example, direct review in the state supreme court was completed in 1969, within

months of respondent's conviction. It was not until 1977 that a collateral attack raising this issue was first brought in state court. Moreover, one who files a Section 2254 action after neglecting to present an important issue on direct appeal deprives the federal court of the benefit of the state court's views on the record and issues of state law. What the State in this case has done by excusing a default at the trial level but enforcing it if the claim is not raised on appeal is simply to adopt a more lenient procedural default rule than it might have chosen. That circumstance should hardly entitle a federal habeas court to ignore the core interests that the State *does* insist on protecting. For these reasons the courts of appeals have generally found little reason to distinguish between defaults at trial and those on direct appeal.[13] This Court too has found the preservation of a claim on direct appeal critical to its availability on collateral attack. Compare *Sunal* v. *Large*, 332 U.S. 174 (1947), with *Davis* v. *United States*, 417 U.S. 333, 345 (1974).

There are, of course, cases where the "cause" requirement of *Wainwright* v. *Sykes* will be satisfied. If, for example, a defendant is denied a fair opportunity to raise his claim in accordance with applicable procedural rules (*e.g.*, if the trial court refuses to entertain objections to jury instructions), that contention would still be available on collateral review, if preserved on direct appeal.[14] In

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[13] *Forman* v. *Smith*, 633 F.2d 634, 636-640 (2d Cir.), cert. denied, 450 U.S. 1001 (1981); *Cole* v. *Stevenson*, 620 F.2d 1055 (4th Cir.), cert. denied, 449 U.S. 1004 (1980); *Huffman* v. *Wainwright*, 651 F.2d 347, 350 (5th Cir. 1981); *Evans* v. *Maggio*, 557 F.2d 430, 433-434 (5th Cir. 1977); *Ford* v. *Strickland*, 696 F.2d 804, 816-817 (11th Cir. 1983). Cf. *Hubbard* v. *Jeffes*, 653 F.2d 99, 101 n.2 (3d Cir. 1981); *Matias* v. *Oshiro*, 683 F.2d 318, 321 & n.3 (9th Cir. 1982). Contra, *Holcomb* v. *Murphy*, 701 F.2d 1307, 1309-1311 (10th Cir. 1983). For an excellent discussion of the principles applicable to such cases, see *Norris* v. *United States*, 687 F.2d 899, 901-904 (7th Cir. 1982) (collateral attack on federal conviction).

[14] See *White* v. *Estelle*, 586 F.2d 500 (5th Cir. 1978). Cf. *Rose* v. *Mitchell*, 443 U.S. 545, 561, 563 (1979); *Stone* v. *Powell*, 428 U.S. 465 (1976); *Reece* v. *Georgia*, 350 U.S. 85 (1955); *Sunal* v. *Large*,

those circumstances the possibility of injustice is plain, and the state's interest, if any, in generally enforcing unfair or unreasonable procedural rules is plainly outweighed by the defendant's right to a fair opportunity to raise his claims. There may well be other "exceptional circumstances" (*Wainwright* v. *Sykes*, 433 U.S. at 91 & n.14) that would satisfy the "cause" requirement. But it is unnecessary to speculate as to what they might be, since it is clear that this case, like *Engle* v. *Isaac*, is not such an instance.

II. THE PRINCIPLES GOVERNING RETROACTIVITY SUGGEST THAT NOVELTY CAN NEVER BE "CAUSE" JUSTIFYING A PROCEDURAL DEFAULT

In Part I we have argued that respondent's claim was not novel at the time of his trial and direct appeal—a point sufficient to dispose of this case. We believe, however, that it is possible to state a clearer rule resolving not only this case, but also similar problems that may arise in the future. We argue below that the principles governing retroactivity, which reflect the gradual character of evolution of legal doctrine, assure that there will be few, if any, constitutional claims that are "novel" as applied to cases on collateral review. Moreover, even if that is not so, we further argue that novelty should never qualify as "cause" for a procedural default.

Whether the novelty of a constitutional claim can be cause for a procedural default is an issue that arises only when this Court has both upheld the claim on the merits and made it fully retroactive to cases on collateral review. The court of appeals here noted that *Mullaney* v. *Wilbur* applied retroactively to cases tried in 1969, but then held that the claim validated in *Mullaney* was too novel to be perceived and litigated in such cases

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332 U.S. 174, 182-183 (1947); *Boyd* v. *Mintz*, 631 F.2d 247 (3d Cir. 1980). See generally *Dumont* v. *Estelle*, 513 F.2d 793, 797 (5th Cir. 1975). See also *Pedrero* v. *Wainwright*, 590 F.2d 1383 (5th Cir. 1979); Hill, *The Forfeiture of Constitutional Rights in Criminal Cases*, 78 Colum. L. Rev. 1050 (1978).

(Pet. App. 3, 5-7). These two conclusions are inconsistent. Implicit in the notion of full retroactivity is the idea that trials conducted in violation of the retroactive rule were so defective when held that they must be done over again (or simply nullified and not rerun). But it is difficult to imagine how a proceeding could be fatally flawed for a reason so novel that it was inconceivable to the participants.

A. Procedural Rights Made Fully Retroactive Are By Their Nature Not Novel As Applied To Cases On Collateral Review

1. Those newly recognized criminal procedural rights which this Court has made fully retroactive have all been designed "to overcome an aspect of the criminal trial that *substantially* impairs its truth-finding function and so raises *serious* questions about the accuracy of guilty verdicts in past trials * * *." *Hankerson* v. *North Carolina*, 432 U.S. at 243.[15] Of course "whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree." *Johnson* v. *New Jersey*, 384 U.S. 719, 728-729 (1966); *Stovall* v. *Denno*, 388 U.S. 293, 297-299 (1967). And where the effect of the old rule has not been serious and substantial enough, a de-

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[15] The other class of decisions that have been made fully retroactive embraces cases "ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place. * * * In such cases, the Court has relied less on the technique of retroactive application than on the notion that the prior inconsistent judgments or sentences were void *ab initio*." *United States* v. *Johnson*, 457 U.S. 537, 550 (1982). Examples are *Ashe* v. *Swenson*, 397 U.S. 436, 437 n.1 (1970) (retroactive application of double jeopardy ruling in *Benton* v. *Maryland*, 395 U.S. 784 (1969)); *Moore* v. *Illinois*, 408 U.S. 786, 800 (1972) (retroactive application of Eighth Amendment ruling in *Furman* v. *Georgia*, 408 U.S. 238 (1972)). See also *Michigan* v. *Payne*, 412 U.S. 47, 61-62 (1973). But cf. *Gosa* v. *Mayden*, 413 U.S. 665 (1973).

cision supplanting it will not be made fully retroactive (*ibid.*). But rights that do have a sufficient impact on the determination of guilt are not cut by this Court from whole cloth. The allocation of the burden of proof, for example (as we have shown above), is a matter that courts trying and reviewing criminal cases had to consider on innumerable occasions. And though their decisions were not unanimous, many reached the same conclusion ultimately validated by this Court.

This inverse relationship between retroactivity and novelty is well recognized. It is typically expressed by noting that rights made fully retroactive, because of their importance to truth-finding, have had the sanction of history and tradition. Rules that make a clear break with precedent, on the other hand, however important they may be for reasons unrelated to the determination of guilt, are limited to prospective application or are retroactive only to cases pending on direct review. Thus,

> if the purposes of a new rule implicate decisively the basic truth-determining function of the criminal trial, then * * * the rule should be given full retroactive application, for the required constitutional procedure itself would then stand as a concrete embodiment of "the concept of ordered liberty." *Palko* v. *Connecticut*, 302 U.S. 319, 325 (1937).

Williams v. *United States*, 401 U.S. 646, 666 (1971) (Marshall, J., concurring in part and dissenting in part). Justice Harlan came to a similar conclusion. He would have denied full retroactivity to rules of constitutional criminal procedure, with the exception of "those procedures that * * * are 'implicit in the concept of ordered liberty.'" *Mackey* v. *United States*, 401 U.S. 667, 693 (1971) (Harlan, J., concurring and dissenting) (quoting *Palko* v. *Connecticut*, 302 U.S. at 325). See also *Hankerson* v. *North Carolina*, 432 U.S. at 248 n.2 (Powell, J. concurring). But as *Palko* itself noted, rights "implicit

in the concept of ordered liberty" are " 'rooted in the traditions and conscience of our people' " and "can be traced in our history, political and legal." 302 U.S. at 325, 327. In short, retroactive application has "the justifiable effect of curing errors committed in disregard of constitutional rulings already clearly foreshadowed." *Johnson* v. *New Jersey*, 384 U.S. at 731.

By contrast, the Court's most recent treatment of retroactivity in the criminal context notes that

> where the Court has expressly declared a rule of criminal procedure to be "a clear break with the past," * * * it almost invariably has gone on to find such a newly minted principle nonretroactive. See *United States* v. *Peltier*, 422 U.S. 531, 547, n.5 (1975) (Brennan, J., dissenting) (collecting cases). In this * * * type of case, the traits of the particular constitutional rule have been less critical than the Court's express threshold determination that the " 'new' constitutional interpretatio[n] . . . so change[s] the law that prospectivity is arguably the proper course" * * *.

United States v. *Johnson*, 457 U.S. 537, 549 (1982). See also *Tehan* v. *United States ex. rel. Shott*, 382 U.S. 406, 410-412, 417 (1966). That observation, the Court held, "is not inconsistent with our precedents giving complete retroactive effect to constitutional rules whose purpose is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function" (457 U.S. at 562 n.21). The reason, of course, is that those precedents were not "newly minted" (*id.* at 549), but anticipated far in advance of this Court's decisions.

2. A brief review of the procedural rights this Court has held fully retroactive substantiates these conclusions. Such rights have been essential to the integrity of the truth-finding process, have been deemed implicit in the concepts of ordered liberty and fundamental fairness, and have been clearly foreshadowed in the law's earlier development.

One class of such rights concerns the allocation and standard of proof. The former is the issue here and in *Hankerson* v. *North Carolina* (holding *Mullaney* v. *Wilbur* retroactive). The latter was at issue in *Ivan V.* v. *City of New York*, 407 U.S. 203 (1972) (holding *In re Winship* retroactive). Each procedure is "a prime instrument for reducing the risk of convictions resting on factual error." [16] Each is also considered " 'essential for the protection of life and liberty' " and required by notions of " 'fundamental fairness.' " [17] And for that reason it is not surprising that each was clearly foreshadowed by earlier decisions of this and other courts.[18]

A second group of rights concerns the composition and unanimity of juries.[19] The selection of a jury partial to capital punishment "undermine[s] 'the very integrity of the . . . process' that decides [a defendant's] fate[.]" [20] Similarly, a nonunanimous six-person jury "poses a * * * threat to the truth-determining process itself." [21] The former practice, the Court noted, ignores "basic requirements of procedural fairness." [22] The latter was a distinctly idiosyncratic innovation whose invalidity "was distinctly foreshadowed" by this Court's earlier decisions.[23]

A third class of rights made fully retroactive includes matters crucial to the correct functioning of the trial

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[16] *In re Winship*, 397 U.S. at 363; *Hankerson*, 432 U.S. at 241.

[17] *In re Winship*, 397 U.S. at 362, 363; see also *id.* at 373 n.5 (Harlan, J., concurring); *Hankerson*, 432 U.S. at 241.

[18] See *In re Winship*, 397 U.S. at 362-363; see pages 9-12, *supra*.

[19] The former was the issue in *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968) (declaring its own holding fully retroactive, *id.* at 523 n.22). The latter was in question in *Brown* v. *Louisiana*, 447 U.S. 323 (1980) (holding *Burch* v. *Louisiana*, 441 U.S. 130 (1979), retroactive to a case pending on direct review).

[20] *Witherspoon*, 391 U.S. at 523 n.22.

[21] *Brown* v. *Louisiana*, 447 U.S. at 334 (opinion of Brennan, J.).

[22] *Witherspoon*, 391 U.S. at 521 n.20.

[23] *Brown* v. *Louisiana*, 447 U.S. at 335-336 (opinion of Brennan, J.); see *Burch* v. *Louisiana*, 441 U.S. at 134-138.

process—the right of confrontation and the exclusion of involuntary confessions. The former right is denied when the prosecution introduces preliminary hearing testimony of a witness it has not subpoenaed, or a co-defendant's confession implicating the defendant—practices that "present[] a serious risk that the issue of guilt or innocence may not [be] reliably determined." [24] The latter is ignored when the voluntariness of confessions is left solely for the jury's determination—a practice that may "infect the jury's findings of fact" concerning both voluntariness and guilt.[25] Both rights have been characterized as among the " 'fundamental principles of constitutional liberty.' " [26] And the Court's condemnations of these practices applied retroactively because the decisions were "clearly foreshadowed," [27] or at least in conformity with the "orthodox rule." [28]

The fourth class of rights made fully retroactive by this Court concerns the right to counsel, not only at trial,[29]

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[24] *Roberts* v. *Russell*, 392 U.S. 293, 295 (1968) (holding *Bruton* v. *United States*, 391 U.S. 123 (1968), retroactive); *Berger* v. *California*, 393 U.S. 314 (1969) (holding *Barber* v. *Page*, 390 U.S. 719 (1968), retroactive to a case on direct appeal).

[25] *Jackson* v. *Denno*, 378 U.S. 368, 383 (1964), held retroactive in *McNerlin* v. *Denno*, 378 U.S. 575 (1964).

[26] *Bruton* v. *United States*, 391 U.S. at 135; *Barber* v. *Page*, 390 U.S. at 721 ("essential and fundamental requirement for * * * [a] fair trial"). See *Jackson* v. *Denno*, 378 U.S. at 376-391.

[27] *Berger* v. *California*, 393 U.S. at 315.

[28] *Jackson* v. *Denno*, 378 U.S. at 378; see *id.* at 411-423 (Appendix A to opinion of Black, J., dissenting in part and concurring in part). *Bruton* v. *United States* overruled the decision of this Court in *Delli Paoli* v. *United States*, 352 U.S. 232 (1957). But *"Delli Paoli* [was] under attack from its inception and many courts * * * in fact rejected it." *Roberts* v. *Russell*, 392 U.S. at 295; see also *Bruton* v. *United States*, 391 U.S. at 128-135 & nn.4, 8, 10.

[29] *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), applied retroactively in *Pickelsimer* v. *Wainwright*, 375 U.S. 2 (1963); *Berry* v. *City of Cincinnati*, 414 U.S. 29 (1973) (holding *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), retroactive).

but also at the pleading[30] and sentencing stages.[31] It hardly needs to be said that the right "relates to 'the very integrity of the fact-finding process.'"[32] And this Court's incorporation of it in the Fourteenth Amendment rested on the recognition that it is " 'implicit in the concept of ordered liberty.' "[33] It is true that *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), overruled a directly contrary decision in *Betts* v. *Brady*, 316 U.S. 455 (1942). But that is hardly tantamount to an indication that the rule announced in *Gideon* was "novel" in the sense relevant here, for as *Gideon* noted, "*Betts* was 'an anachronism when handed down' " (372 U.S. at 345).[34]

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[30] *Arsenault* v. *Massachusetts*, 393 U.S. 5 (1968) (holding *White* v. *Maryland*, 373 U.S. 59 (1963), retroactive).

[31] *McConnell* v. *Rhay*, 393 U.S. 2 (1968) (holding *Mempa* v. *Rhay*, 389 U.S. 128 (1967), retroactive).

[32] *McConnell* v. *Rhay*, 393 U.S. at 3 (quoting *Linkletter* v. *Walker*, 381 U.S. 618, 639 (1965)).

[33] *Gideon* v. *Wainwright*, 372 U.S. at 342 (quoting *Palko* v. *Connecticut*, 302 U.S. at 325).

[34] See also *Argersinger* v. *Hamlin*, 407 U.S. at 27 n.1 (noting that 31 states already provided counsel to defendants charged with crimes less serious than felonies).

We note that deprivation of the right to counsel at trial, though it would not have presented a novel issue even in pre-*Gideon* cases, satisfies the "cause" prong of the cause-and-prejudice rule for a different, and obvious, reason: it makes little sense to hold an unrepresented defendant bound by procedural default rules designed with lawyers in mind. See *Kitchens* v. *Smith*, 401 U.S. 847, 848 (1971) ("the right to be furnished counsel does not depend on a request").

One other right which this Court has held fully retroactive, but which fits none of the classes mentioned above, is the equal protection guarantee of a right to appeal, including the provision of a free transcript where that is a necessary condition to appeal. *Eskridge* v. *Washington Prison Board*, 357 U.S. 214 (1958) (holding *Griffin* v. *Illinois*, 351 U.S. 12 (1956), retroactive). That is obviously something that goes to the integrity of the guilt-determination process, which is otherwise insulated from appellate scrutiny. See *Linkletter* v. *Walker*, 381 U.S. at 639 n.20. Moreover,

B. A Conviction Should Not Be Overturned On Collateral Attack On The Basis Of A Claim That Was Novel At The Time Of Trial

The procedural rights this Court has made fully retroactive have not always been clearly foreshadowed since the time the Constitution was adopted. Compare *Witherspoon* v. *Illinois*, 391 U.S. 510 (1968), with *Logan* v. *United States*, 144 U.S. 263, 298 (1892). But a demonstration to that effect is unnecessary, since the issue is only whether a claim has been "perceived and litigated" (*Engle* v. *Isaac*, 456 U.S. at 134) as recently as the earliest conviction still subject to collateral attack. We have argued above that that standard will almost always be satisfied in cases involving the various rights this Court has held fully retroactive.

There are, nevertheless, two further aspects of the issue which strongly suggest that an inquiry into the novelty of constitutional claims is not even worth undertaking. The first is that such an inquiry is both very time-consuming and standardless. The second is that its outcome may be irrelevant, since it is difficult to see how a conviction can be "fundamentally unfair" (*Engle* v. *Isaac*, 456 U.S. at 131) for reasons so novel that the defendant could not have perceived them at trial or on appeal.

1. As the survey we present above (pages 9-12) indicates, determining when a particular claim may last have been considered novel can be an enormously time-consuming venture. The kind of evidence we have presented—though quite sufficient for purposes of resolving the question here—is only a fragment of the materials one might have to canvas for years earlier than 1969, or for rights less frequently litigated than the burden of proving self-defense and malice. Relevant sources would include not only judicial decisions directly in point, but

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the practice required by *Griffin* was one already followed in many states. *Griffin* v. *Illinois*, 351 U.S. at 19.

also statutory materials from all the states, views of commentators, and judicial and legislative determinations of questions sufficiently analogous to afford "the tools to construct [the] constitutional claim." *Engle* v. *Isaac*, 456 U.S. at 133.

Moreover, even after all the relevant materials are collected, it is still necessary to measure the novelty of a claim at any given date against a standard that may be quite indefinite. The only certain standard would be to say that a claim is no longer novel once it has been "perceived and litigated" (*Engle* v. *Isaac*, 456 U.S. at 134) in any reported case. If more widespread ferment is demanded, it will be difficult to devise a verbal formula expressing the required quantum of precedent, and impossible to assure that the minimum is consistently applied to the various rights made fully retroactive. The best that can be hoped for is that this Court will eventually choose (for each right held fully retroactive) a certain year before which such claims would have been considered novel. Claimants convicted prior to that year would then be assumed to have "cause" for their procedural default, while those convicted later would not.

We hardly need say that an inquiry so complex and undefined affords only uncertain protection to the procedural default rules the "cause and prejudice" requirement is designed to serve. *Wainwright* v. *Sykes*, 433 U.S. at 86-91. An undertaking so unproductive from the point of view of the judicial system should not be launched unless there is good reason to believe it necessary in justice to the convicted defendants. We have argued (pages 18-23) that it is not, because the very notion of full retroactivity implies that a right is exceedingly unlikely to have been truly novel when any cases now on collateral review were tried. But even if that were not so, we would still see little point in deciding when a particular claim could last have been considered novel, as we now explain.

2. This Court noted in *Engle* v. *Isaac*, 456 U.S. at 131, that "later discovery of a constitutional defect unknown

at the time of trial does not invariably render the original trial fundamentally unfair." The relation between the fairness of a conviction and later-discovered rights is generally accommodated by the principles of retroactivity.[35] Even in the case of rights held fully retroactive, however, "[t]he failure of otherwise competent defense counsel to raise an objection at trial is often a reliable indication that the defendant was not denied fundamental fairness in the * * * proceedings." *Rose* v. *Lundy*, 455 U.S. 509, 547 n.17 (1982) (Stevens, J., dissenting). This indication is no less reliable—indeed it becomes compelling—when the reason for counsel's failure to object is not that he has overlooked a visible flaw, but that he, the defendant, the prosecution, and every court and legislature in the country view the practice later held defective as in fact constitutionally proper. Any theory that would equate novelty with cause justifying a procedural default must, in the end, explain why such a trial—universally viewed as fair at the time—should be conducted anew.[36]

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[35] Those rights essential to the fairness of a conviction are made fully retroactive. Those that are not essential are not. Compare the cases cited at pages 20-23, *supra*, with *United States* v. *Peltier*, 422 U.S. 531 (1975) (Fourth Amendment rule of *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), not to be applied retroactively); *Daniel* v. *Louisiana*, 420 U.S. 31 (1975) (fair-cross-section rule for petit juries announced in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), not to be applied retroactively); *Johnson* v. *New Jersey*, 384 U.S. 719 (1966) (guidelines for custodial interrogation established in *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), and *Miranda* v. *Arizona*, 384 U.S. 436 (1966), not to be applied retroactively); *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406 (1966) (rule forbidding adverse comment on defendant's failure to testify, announced in *Griffin* v. *California*, 380 U.S. 609 (1965), not to be applied retroactively); *Linkletter* v. *Walker*, *supra*, (exclusionary rule of *Mapp* v. *Ohio*, 367 U.S. 643 (1961), not to be applied retroactively).

[36] Such a theory would also have to take account of the countervailing considerations that weigh against a new trial. As Judge Friendly has pointed out:

> There is an inevitable attraction in the position that a person convicted of a serious crime should receive a new trial when-

Nor is that the only conundrum posed by equating novelty with cause. Our adversary system assumes, and quite properly, that a defendant is bound by the tactical decisions made by his counsel. That principle affords a convincing reason why collateral attack is precluded by the failure to make a timely objection *after* a new procedural right is recognized. Yet the rule of novelty accepted by the court of appeals has the ironic consequence of allowing collateral review to one whose conviction was considered fair by contemporary standards, yet denying it to one (later convicted) whose conviction violated contemporary standards, though neither objected at trial or on direct review.

It would be odd to assert that such a difference in treatment is required in the name of fairness. And the irony is intensified by several other considerations. For example, Fed. R. Crim. P. 33 provides that "[a] motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment * * *." Newly discovered evidence will often be more suggestive of innocence than faulty procedures, later found to affect the accuracy of fact-finding. Yet the Rules show a greater willingness to reopen more recent, rather than more ancient, trials. Their approach

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ever a later decision of the highest court indicates that, with the benefit of hindsight, a different course should have been followed at his trial in any consequential respect. Yet for courts to yield broadly to that attraction not only would cause "litigation in these criminal cases [to] be interminable" [*Sunal* v. *Large*,] 332 U.S. at 182 * * *, but, in the sole interest of those already convicted of crime, would drastically impair the ability of the Government to discharge the duty of protection which it owes to all its citizens. * * * When a defendant who has been tried fairly in accordance with the law as it was understood at the time seeks judicial relief because of new light on a point of law affecting an aspect of his trial, his request must be balanced against the rightful claims of organized society as reflected in the penal laws.

United States v. *Sobell*, 314 F.2d 314, 324-325 (2d Cir. 1963).

rests on an awareness that after a certain time retrial becomes practically impossible, and on a judgment that the slight chance of finding a truly meritorious claim does not justify perpetual reexamination of final convictions. See Orfield, *New Trial in Federal Criminal Cases*, 2 Vill. L. Rev. 293, 299-304 (1957). Those considerations are equally relevant here.

Indeed, there may be even less reason to reopen convictions in cases like this than there is where the evidence is false or incomplete. There is, after all, an anachronism about picking out a particular procedure subsequently abandoned, and asserting that its use tainted prior convictions. That ignores the fact that the legal process as a whole may also have changed in a number of other ways, some of them offsetting. For example, although the burden of disproving self-defense may now be imposed on the prosecution, the substantive law of self-defense may also have changed in ways less favorable to the defendant. See *Perkins on Criminal Law* 1009-1012 (2d ed. 1969). At the same time, a state may have adopted a rule permitting conviction by a nonunanimous jury, see *Apodaca* v. *Oregon*, 406 U.S. 404 (1972), thereby cancelling some of the defendant's advantage from a shift in the burden of proof.

As we made clear above (pages 18-23), we do not believe that any of the various rights this Court has made fully retroactive were in fact novel at the time of any conviction still open to collateral attack. But if we are mistaken in that belief we think, for the reasons just reviewed, that an inquiry into novelty is nevertheless unwarranted. As this Court stated in *Hankerson* v. *North Carolina*, 432 U.S. at 244 n.8, "The States, if they wish, may be able to insulate past convictions by enforcing the normal and valid rule that failure to object to a jury instruction is a waiver of any claim of error." And this should be true even "[i]f the validity of * * * burden-shifting presumptions were as well settled * * * as [North Carolina] asserts[.]"

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX A

Those states imposing on the prosecution the burden of persuasion on the issue of malice include:

Arizona

State v. *Schroeder*, 95 Ariz. 255, 389 P.2d 255, cert. denied, 379 U.S. 939 (1964)

California

Jackson v. *Superior Court*, 62 Cal. 2d 521, 399 P.2d 374, 42 Cal. Rptr. 838 (1965)

Colorado

Leonard v. *People*, 149 Colo. 360, 369 P.2d 54 (1962)

Florida

Bolin v. *State*, 297 So. 2d 317 (Fla. App. 1974) (citing long-settled law)

Idaho

State v. *Jurko*, 42 Idaho 319, 245 P. 685 (1926)

Illinois

People v. *Warren*, 33 Ill.2d 168, 210 N.E.2d 507 (1965)

Indiana

King v. *State*, 249 Ind. 699, 234 N.E.2d 465 (1968) (settled law)

Iowa

State v. *Haffa*, 246 Iowa 1275, 71 N.W.2d 35, cert. denied, 350 U.S. 914 (1955)

Louisiana

State v. *Carter*, 227 La. 820, 80 So. 2d 420 (1955)

Nebraska

Haswell v. *State*, 167 Neb. 169, 92 N.W.2d 161 (1958)

Nevada

White v. *State*, 82 Nev. 304, 417 P.2d 592 (1966)

New Jersey
State v. *Gardner*, 51 N.J. 444, 242 A.2d 1 (1968)

New York
People v. *Sandgren*, 302 N.Y. 331, 98 N.E.2d 460 (1951)

North Dakota
State v. *Hoerner*, 55 N.D. 761, 215 N.W. 277 (1927)

Oklahoma
Thompson v. *State*, 365 P.2d 834 (Okla. Crim. 1961)

Oregon
Goodall v. *State*, 1 Or. 333 (1861)

Pennsylvania
Commonwealth v. *O'Neal*, 441 Pa. 17, 271 A.2d 497 (1970) (noting that state law since 1961 has imposed production burden only)

South Dakota
State v. *Reddington*, 80 S.D. 390, 125 N.W.2d 58 (1963)

Virginia
Johnson v. *Commonwealth*, 188 Va. 848, 51 S.E.2d 152 (1949).

APPENDIX B

Those states agreeing with North Carolina that the defendant bears the burden of persuasion concerning absence of malice include:

Arkansas

Bosnick v. *State*, 248 Ark. 1289, 455 S.W.2d 688 (1970) (approving statutory burden on defendant)

Georgia

Holmes v. *State*, 224 Ga. 553, 163 S.E.2d 803 (1968)

Hawaii

State v. *Cuevas*, 53 Hawaii 110, 488 P.2d 322 (1971) (invalidating, on basis of *Winship*, state statute permitting such a burden of proof)

Kentucky

Wheeler v. *Commonwealth*, 472 S.W.2d 254 (Ky. 1971)

Ohio

State v. *Callihan*, 11 Ohio App. 2d 23, 227 N.E.2d 654 (1967)

Tennessee

Thomas v. *State*, 210 Tenn. 297, 358 S.W.2d 315 (1962)

Texas

Bussey v. *State*, 147 Tex. Crim. 447, 181 S.W.2d 94 (1944)

Washington

State v. *Mays*, 65 Wash. 2d 58, 395 P.2d 758 (1964); see *State* v. *Kroll*, 87 Wash. 2d 829, 558 P.2d 173, 181-182 (1976) (overruling, on basis of *Mullaney*, practice of putting burden of mitigation on defendant).

APPENDIX C

Those states imposing on the prosecution the burden of persuasion on the issue of self-defense include:

Alabama

Pounders v. *State*, 282 Ala. 551, 213 So. 2d 394, 395 1968)

Alaska

De Groot v. *United States*, 78 F.2d 244 (9th Cir. 1935); see also *Toomey* v. *State*, 581 P.2d 1124 (Alaska 1978)

Arizona

State v. *Schroeder*, 95 Ariz. 255, 389 P.2d 255, cert. denied, 379 U.S. 939 (1964)

California

People v. *Cornett*, 33 Cal. 2d 33, 198 P.2d 877 (1948)

Colorado

Leonard v. *People*, 149 Colo. 360, 369 P.2d 54 (1962)

Florida

Bolin v. *State*, 297 So. 2d 317, 318-319 (Fla. App. 1974) (citing settled law)

Illinois

People v. *Warren*, 33 Ill. 2d 168, 210 N.E.2d 507 (1965)

Indiana

King v. *State*, 249 Ind. 699, 234 N.E.2d 465, 468 (1968) (settled law)

Iowa

State v. *Badgett*, 167 N.W.2d 680 (Iowa 1969)

Louisiana
State v. *Carter*, 227 La. 820, 80 So. 2d 420 (1955)

Michigan
People v. *Hartwick*, 8 Mich. App. 193, 154 N.W.2d 24, 26 (1967) (settled law)

Minnesota
State v. *Quinn*, 186 Minn. 242, 243 N.W. 70 (1932)

Mississippi
Turner v. *State*, 220 So. 2d 295, 298 (Miss.), cert. denied, 396 U.S. 834 (1969) (citing settled law)

Missouri
State v. *Holt*, 434 S.W.2d 576, 579 (Mo. 1968); *State* v. *Davis*, 342 Mo. 594, 116 S.W.2d 110, 112 (1938)

Montana
State v. *Powell*, 54 Mont. 217, 169 P. 46 (1917)

Nebraska
Gravely v. *State*, 38 Neb. 871, 57 N.W. 751 (1894)

New Jersey
State v. *Gardner*, 51 N.J. 444, 242 A.2d 1, 6 (1968)

New Mexico
State v. *Cochran*, 78 N.M. 292, 430 P.2d 863 (1967)

North Dakota
State v. *Hoerner*, 55 N.D. 761, 215 N.W. 277 (1927)

Oklahoma
Edwards v. *State*, 58 Okla. Crim. 15, 48 P.2d 1087 (1935); *Cottrell* v. *State*, 458 P.2d 328 (Okla. Crim. 1969)

South Dakota
State v. *Wilcox*, 48 S.D. 289, 204 N.W. 369 (1925); *State* v. *Reddington*, 80 S.D. 390, 125 N.W.2d 58 (1963)

Vermont

State v. *Barrett*, 128 Vt. 462, 266 A.2d 441, 443 (1970); *State* v. *Wilson*, 113 Vt. 524, 527, 37 A.2d 400 (1944)

Virginia

Jones v. *Commonwealth*, 187 Va. 133, 45 S.E.2d 908 (1948)

APPENDIX D

Those states requiring the defendant to raise a reasonable doubt on the issue of self-defense include:

Arkansas

Mode v. *State*, 231 Ark. 477, 330 S.W.2d 88 (1959)

Idaho

State v. *Lundhigh*, 30 Idaho 365, 164 P. 690 (1917)

Nevada

State v. *Skinner*, 32 Nev. 70, 104 P. 223 (1909)

Oregon

State v. *Jarvi*, 3 Or. App. 391, 474 P.2d 363 (1970) (citing 1920 precedent)

Washington

State v. *Turpin*, 158 Wash. 103, 290 P. 824 (1930)

APPENDIX E

Those states agreeing with North Carolina that the defendant bears the burden of persuasion on the issue of self-defense include:

Delaware

State v. *Winsett*, 205 A.2d 510 (Del. 1964) (by preponderance)

Georgia

Henderson v. *State*, 234 Ga. 827, 218 S.E.2d 612, 617 (1975) (relying on *Mullaney* to overrule state practice of placing burden on defendant to prove defense to satisfaction of jury)

Kentucky

Harvey v. *Commonwealth*, 318 S.W.2d 868 (Ky. 1958); *Wheeler* v. *Commonwealth*, 472 S.W.2d 254, 256 (Ky. 1971) (by convincing evidence)

Maryland

Evans v. *State*, 28 Md. App. 640, 349 A.2d 300 (1975) (following *Mullaney* in overruling state rule requiring defendant to prove self-defense by preponderance of evidence), aff'd, 278 Md. 197, 362 A.2d 629 (1976)

Ohio

State v. *Reid*, 3 Ohio App. 2d 215, 210 N.E.2d 142 (1965); *State* v. *Callihan*, 11 Ohio App. 2d 23, 227 N.E.2d 654 (1967) (preponderance of evidence)

Pennsylvania

Commonwealth v. *Commander*, 436 Pa. 532, 260 A.2d 773, 778 (1970) (citing established requirement of proof by preponderance of evidence)

Rhode Island

State v. *Mellow*, 107 A. 871 (R.I. 1919) (preponderance of evidence)

South Carolina

State v. *Richburg*, 250 S.C. 451, 158 S.E.2d 769, 772 (1968), appeal after remand, 253 S.C. 458, 171 S.E. 2d 592 (1969), cert. denied, 399 U.S. 930 (1970) (by greater weight of evidence)

Tennessee

Nance v. *State*, 210 Tenn. 328, 358 S.W.2d 327 (1962); *Keith* v. *State*, 218 Tenn. 395, 403 S.W.2d 758 (1966) (no standard)

Texas

Escamilla v. *State*, 464 S.W.2d 840, 841 (Crim. App. 1971) (no standard)

West Virginia

State v. *Harlow*, 137 W.Va. 251, 71 S.E.2d 330 (1952) (by preponderance of evidence)

APPENDIX F

Federal cases treating the standard and allocation of proof as constitutional requirements include:

Government of Virgin Islands v. *Lake*, 362 F.2d 770, 774 (3d Cir. 1966) (presumption of innocence and requirement that prosecution prove guilt beyond a reasonable doubt are elements of due process)

Government of Virgin Islands v. *Torres*, 161 F. Supp. 699, 700 (D.V.I. 1958) (same)

United States v. *Johnson*, 476 F.2d 1251, 1255 (5th Cir.), cert. denied, 414 U.S. 852 (1973) (citing pre-*Winship* law for proposition that prosecution's requirement to prove every element of offense beyond a reasonable doubt is an "obvious rudiment of due process")

Chromiak v. *Field*, 406 F.2d 502, 504 (9th Cir.), cert. denied, 395 U.S. 1017 (1969) (recognizing that shifting burden of proof to defendant on elements of offense would violate due process)

Reynolds v. *United States*, 238 F.2d 460, 463 (9th Cir. 1956) (observing that the presumption of innocence rests on fundamental concepts)

Yates v. *United States*, 316 F.2d 718, 725 (10th Cir. 1963) (treating presumption of innocence and burden of proof as elements of due process)

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